



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 211 OF 2008

IN THE MATTER OF THE ESTATE OF NJUGUNA MWAURA MBOGO (DECEASED)

VERSUS

ELIZABETH NYAMBURA NJUGUNA (WIDOW)-.....-1ST PETITIONER

FRANCIS KAMAU NJUGUNA (SON).....2ND PETITIONER

VERSUS

JUMAA FARMERS COMPANY LIMITED.....APPLICANT/OBJECTOR

R U L I N G

1. Njuguna Mwaura Mbogo died on 2nd April 2006. Succession Cause Number 211 of 2008 was filed with respect to his estate. One of the properties in his name was L.R. No. 10581/Nakuru. In the Certificate of Confirmation of Grant made on 21st January 2010, the same was inherited by Elizabeth Nyambura Njuguna and Francis Kamau Njuguna, the administrators in equal shares.

2. On 9th February 2018 Jeremiah Mutura Kinyanjui filed a Certificate of Urgency dated 8th February 2018 under **Order 51 rule 14 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Sections 74 to 76 of the Laws of Succession Act and Articles 1, 2, 10, 19 to 23, 27, 40, 47, 50, 156 (6), 159 (2) (d), 166 (2) (b) and 259 of the Constitution of Kenya 2010.**

3. The Certificate of Urgency is supported by an affidavit sworn by Simon Kimani Ng'ang'a.

4. There is the actual application Notice of Motion dated 8th February 2018 supported by the affidavit of the applicant sworn on the same date, and numerous annexures. The application sought the following orders;

1. This instant application be certified urgent and an inter parties hearing date granted by the trial court.

2. Jumaa Farmers Company Limited be enjoined for further orders.

3. Pending the determination and disposal of this application the petitioners be restrained by orders of this trial court from alienation especially subdividing and allocating out howsoever to whomsoever the suit property land parcel Registration L.R. 10581 other than to Jumaa Farmers Company Limited.

4. Pending the determination and disposal of this instant application The County Commissioner Nakuru County enjoined by the Nakuru County Commander execute the court order refraining the petitioners from alienating especially subdividing and allocating out howsoever to whomsoever the suit property land parcel Registration L.R. 10581.

5. The part of the grant issued on 21.10.2010 to the petitioners that relates to the suit property registration LR 10581 be rectified and revoked forthwith ab initio be revoked as the free properties of the late Njuguna Mwaura Mbogo ab ignition wef 2.4.2006.

6. The petitioners be condemned with the cost of this application at the higher scale under the advocates remunerations order 2014.

5. The grounds for the application are thirty eight (38) *inter alia*:-

03.0 *The urgency is the fact that the grant issued on 21.01.2020 is being executed to fraudulently and illegally alienate the suit property registration L.R. 10581 from Jumaa Farmers Company Limited.*

0.70 *At all material times Mr. Waiganjo t/a M/S Waiganjo & Co. Advocates has conducted Nakuru High Court Succession 211/2008 using the ex-parte judgment on 19.2.2003 (Hayanga J) in Nairobi HCCC 935/2001. Jumaa Farmers Company Limited shall call Mr. Waiganjo as witness in this matter.*

11.0 *The Letter of Administration issued on 21.01.2010 in the matter of the estate of the late Njuguna Mwaura Mbogo is based on untenable deceitful and fraudulent concealment and misrepresentation that the suit property registration L.R. 10581 is the free property of the Estate of the late Njuguna Mwaura Mbogo.*

17.0 *At all material times this Succession Cause Number 211/2008 originate from the judgment given on 19.2.2003 (Al Hayanga J) and procured by the late Njuguna Mwaura Mbogo in Nairobi HCCC 935/2001 ex-parte Jumaa Famers Company Limited.*

28.0 *At all material times the petitioners have instituted Nakuru High Court ELC 43/2013 and procured orders issued on 17/9.2017 the genesis of alienating and subdividing the suit property L.R. 10581.*

6. On 12th February 2018, the matter was placed before the duty Judge who certified the application as urgent and directed the same to be served. The matter was fixed for hearing inter-partes on 20th February 2018. Justice Odero noted:

“I have perused the judgment of Hon. Justice Mulwa dated 21-9-2017. The court decided the case in favour of the petitioner and if the respondent was aggrieved he was at liberty to appeal against that judgment. At the present time I will not grant the temporary orders.”

7. Francis Kamau Njuguna filed his Replying Affidavit on 20th February 2018. He annexed the pleadings and judgment in High Court Civil Case (HCCC) Number 935 of 2001, the ruling dismissing the applicants’ application to be joined in HCCC Number 935 of 2001, the Judgment in Environment and Land Court (ELC) Case Number 43 of 2013 formerly HCCC Number 181 of 2008. He deponed that the issue of ownership had been determined in HCC 935 of 2001 and ELC 43 OF 2013 and the applicants had never appealed those decisions.

8. In a further affidavit filed on 29th April, 2019 sworn on 26th April 2019 the applicant reiterated his previous affidavit and deponed further;

9. *THAT I am advised by our advocates on record that the late Njuguna Mwaura Mbogo was fraudulent:- PARTICULARS OF NON-DISCLOSURE/FRAUD*

(a) He failed to disclose that he was a director of the Applicant/Objector herein Jumaa Farmers Company Limited and that the Applicant/Objector had purchased the land in dispute L.R. No. 10581 from E.K. Banks Ltd (AMPIVA ESTATE).

(b) The deceased Njuguna Mwaura Mbogo failed to disclose that the parcel of land L.R. No. 10581 was occupied by squatters and members of the Applicant/Objector herein Jumaa Farmers Limited and;

(c) That the deceased Njuguna Mwaura Mbogo fraudulently procured a judgment and a decree for adverse possession knowing that he was never in possession of the land in dispute.

10. *THAT the judgment obtained by the late Njuguna Mwaura Mbogo and the subsequent decree were tainted by the fraud and lack of the solemnity required of court proceedings. Consequently, all acts done in pursuance of the said decree are void.*

13. *THAT the petitioners even when they were aware that there were several disputes still pending in Court yet they proceeded to have the parcel of Land known as LR. No. 10581 Nakuru be confirmed on 21st January 2010 as part of the deceased Estate by Honourable Justice D.K. Maraga as he then was.*

14. *THAT the petitioners deliberately failed to disclose to Honourable Justice D. K. Maraga as he then was that there was a pending suit at the High Court Nakuru in ELC CASE NO. 43 OF 2013 Formerly Civil Suit No. 181 of 2008: ELIZABETH NYAMBURA NJUGUNA & ANOTHER (Suing as the administrators of the Estate of NJUGUNA MWAURA MBOGO (DECEASED) VS JUMAA FARMERS CO. LTD & 6 OTHERS where in this suit the Applicant/Objectors had filed a defence and counterclaim in respect to the parcel of land known as L.R. No. 10581 Nakuru.*

15. *THAT the decision in the above cited matter ELC CASE NO. 43 OF 2013 Formerly Civil Suit No. 181 of 2008 was delivered on 21st September 2017 by Honourable Justice J. N. MULWA and the Applicant/Objector being dissatisfied with the said decision has filed an appeal.*

16. *THAT I am aware that in respect to the parcel of land known as L.R. NO. 10581 NAKURU there are several matters still pending in the Honourable Courts both in the High Court and the Court of Appeal in Nakuru and Nairobi claiming ownership and these matters are as follows:-*

(a) HIGH COURT NAKURU ELC NO. 152 OF 2018 FORMERLY CIVIL CASE 935 OF 2001 NAIROBI: NJUGUNA MWAURA MBOGO VS E.K. BANKS LIMITED & ANOTHER

(b) *NAIROBI CIVIL APPEAL NO. 404 OF 2017: ELIZABETH NYAMBURA NJUGUNA & ANOTHER (Suing as the Legal Representative of Njuguna Mwaura MBOGO deceased) vs E.K. BANKS LIMITED & ANOTHER*

(c) *COURT OF APPEAL NAKURU CIVIL APPLICATION NO. 38 OF 2018: EDWARD KINGS ONYANCHA MAINA VS ELIZABETH NYAMBURA NJUGUNA & ANOTHER (Suing as the Legal Representative of Njuguna Mwaura MBOGO deceased).*

9. On 3rd May 2019, the petitioners filed Chamber Summons dated 3rd May 2019 seeking orders that the application dated 8th February 2018 be struck out with costs. It was brought under **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules**. The same is supported by the affidavit of Francis Kamau Njuguna. The grounds are that in Originating Summons 935 of 2001 over LR 10581, the High Court had rendered itself via ruling of 29th January 2004 and the judgment of ELC 43 of 2013 both of which were never appealed from. That this application was litigating on issues already litigated upon.

10. The application was opposed via Replying Affidavit of Ruth Wanjiru Ng'ang'a filed on 17th May 2019 where she depones *inter alia*:-

6. *THAT the objector herein in its Notice of Motion Application dated 8th February 2018, relied on sections 74-76 of the Law of Succession Act seeking for Orders inter alia that the suit property registration LR 10581 be rectified and revoked forthwith from the properties of the late Njuguna Mwaura Mbogo.*

8. *THAT the objector herein is an interested party by dint of Section 76 of the Law of Succession Act who avers that it purchased suit property LR 10581 and thus any interested party as used in the Provision under Section 76 of the Law of Succession Act is wide enough to accommodate any person with a right or expectancy in the Estate.*

And re stated the particulars of non-disclosure and fraud.

11. Thereafter parties filed submissions through their respective counsel on both applications. The applicants through Anyango Opiyo & Company Advocates, the respondent through Waiganjo & Company Advocates. The applicant also filed a bundle of authorities relied on the following bundle of authorities;

1. **Augustine Johnstone Moi Kirigia vs Catherine Muthoni Isumali Kirimi [2017] eKLR**

2. **Baland Singh vs R Crim. Appeal no. 483 – Court of Appeal for Eastern Africa**

3. **Chumo Arap Songok vs David Kibego, CA No. 141 of 2004**

4. **End of Era (Tribute to Chief Justice Willy Mutunga, bench Bulletin Issue 33, April-June 2016.**

5. **In Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**

6. Of the Relevancy of facts.

7. **In Rukia Chadikha Issa v Daniel Mdei Muriuki & Idime Enterprises Limited Civil Case No. 49 of 2012**

8. **In Zahira Habibullah Sheikh & Another v State of Gujarat & Others Air 2006 Sc 1367**

9. **Murugan & Another v State by Public Prosecutor, Tamil Nadu & Another [2008] INSC 1668 “**

12. Counsel highlighted their submissions. Ms. Opiyo placed reliance on the submissions and authorities cited. She argued that the applicant was questioning the legitimacy of LR 10581 belonging to the deceased. That the applicant had bought 75% shares from Ampiva Estate Limited at a time when the deceased was the treasurer of the applicant, and that he went before *Hayanga J*, sought diverse possession without disclosing the existence of the applicants herein. That *Hayanga J's* orders gave approval to illegal orders. To these submissions Mr. Waiganjo raised objection. That it was ill advised for counsel to challenge the judgment of *Hayanga J* before a court of concurrent jurisdiction. Her response was that she was challenging the manner in which the judgment was obtained, and relied on **Chumo Arap Songok vs David Kibiegon COA 141 of 2004 [2006] eKLR at page 30**. She urged this court to find that it was not powerless faced with the illegality that was carried out before *Hayanga J*.

13. Further that there was a pending matter before the Court of Appeal regarding this parcel of land, that the petitioners had failed to disclose the pendency of court matters in 2010 when they obtained the grant. That this court had power under **Section 76 of the Law of Succession Act** to revoke the grant.

14. Regarding the application of 3rd May 2019, that no sufficient grounds had been raised on the matter to warrant striking out. That it was not procedural to file an application to seek the striking out of another application.

15. In response, Mr. Waiganjo submitted that the application was procedurally wrong. That the applicant seeking revocation was required by **Law of Succession Act** to file Summons for Revocation of Grant and not Notice of Motion. Hence it was incompetent.

16. That there were two (2) judgments and a ruling in favour of the petitioners. That in the hearing of those matters, the arguments raised before me were raised before my fellow Judges.

17. That the applicants could not feign ignorance of this cause as in the hearing of ELC 43 of 2013 the grant was produced. The applicants had also annexed the said ruling and the judgments in 935 of 2001 and ELC 43 of 2013. That in ELC 43 of 2013 the court issued permanent injunction restraining applicants out of 10581 also known as Solai/Ndungeri Block 9. The judgment is still in force.

18. That the applicants were not here as beneficiaries but challenging ownership of the property, an issue out of the jurisdiction of this court.

19. That this was an application suitable for striking out. That the **Chumo** case was about fraud, and that issue would not be litigated here. In any event, as a body corporate the applicant would not be issued with a grant.

20. The issue for determination is whether the application of 8th February 2018 has any merit. In determining this issue, the issues raised in the application of 3rd May 2019 will be determined. My view is that there was no need to file that application. In saying that I must point out that the parties herein have in various ways engaged the courts on the same issue by splitting hairs. This parcel of land LR 10581 is the subject of numerous suits, but what is before me, is simply whether any of the ingredients set out by **Section 76** of the Law of Succession Act has been established.

21. **Section 76** states:

Revocation or annulment of grant

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or (ii) to proceed diligently with the administration of the estate; or (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

22. I cannot ignore the grounds upon which the applicants have sought to bring in, **Section 76 of the Law of Succession Act**, by claiming that when the deceased obtained judgment before *Hayanga J* he did not disclose the interests of the applicant. Secondly, that the applicants are interested parties because they are buyers/purchasers of 75% of the land. Thirdly, that the judgment of *Hayanga J* was obtained through an illegality.

23. It is also noteworthy out of the bundle of authorities the applicant placed before the court, counsel made reference only to one of them, the case of **Chumo**. The others were only in the bundle.

24. In dealing with these issues before me, I must keep in mind the decisions of the judges before me on the same issues. In his ruling of 29th January 2004 *I. Lenaola Ag J* (as he then was) dealt with the claim that the applicants were purchasers. This was in the Originating Summons in HCCC 935/01 where the applicant herein sought to be joined in that suit. Referring to the “*only lonely piece of evidence*” produced by the applicant to prove that it had bought the land, the same receipt that has been produced before me, the receipt issued by Kaplan & Stratton Advocates on 26th October 1977, the Judge said;

“And what is the receipt for? “Deposit on account for price of shares –Ampiva Estate Limited” I have not been told that Ampiva Estate is the same as the suit property. In effect the Applicant is a stranger to the suit land if this is all it has to show its purported purchasers interest. Incidentally, this was the fulcrum of its case - purchaser’s interest!”

25. This finding has never been challenged on appeal.

26. With regard to the alleged illegality *Hayanga J*’s judgment in HCCC (O)S 935 of 2001, *Justice Mulwa* in ELC 43 of 2013 had this to say;

“27. The deceased estate represented by the plaintiffs have proved their claim on ownership by transmission of the suit land. This ownership has not been impeached in any other suit or in any other proceedings. The judgment that pronounced the deceased as

the proprietor by advance possession is intact. No reasons at all were advanced as to why no appeal was lodged against the decision when the defendants discovered what they allege to have been “fraudulent and corrupt scheme.” by the deceased through which he obtained title thereto. This court is barred from trying to or attempt to impeach a judgment of a court of concurrent jurisdiction. See **Jane Njeri Maina** case above...

29.I have noted that the same issues of fraud and breach of trust were raised and determined in various applications by the defendants in an attempt to set aside the judgment. It would not be appropriate for this court to open that window when a judge of concurrent jurisdiction with this court has dealt with the same and made his decision.....

To move to entertain the same issues in my view would be to sit on appeal from the High Court decisions. That I shall not do as I lack the jurisdiction to do so and would be in contravention of the hierarchy of courts as set out in the Judicature Act Cap 8.

31. Back to the plaintiffs claim for equitable orders of injunction. I have already stated that a prima facie case has been established (*Giella – vs – Cassman Brown*). I have come to findings and conclusions that all the defendants and their members have no proprietary rights over the suit property as the judgment in HCCC No. 935 of 2001 (O.S) declared the deceased as the owner of the suit land and the defendants are trespassers. Their claim for adverse possession and purchase respectively are but statements that can only be addressed and proved in a different suit as I have rendered.

34. At this stage, I am unable to declare the defendants as “encumbrances” or having only recognizable title or interest in the land.

They can only be deemed to be trespassers since 2001 when the title was registered in the deceased’s name, squatting and annoying the plaintiffs by interference with the suit land.”

27. From the foregoing pronouncements it is clear that the issues raised by the applicant regarding their claim that they are purchases, of the alleged the illegality of *Hayanga J’s* judgment and of alleged non-disclosure on the part of the deceased, were all determined. These pronouncements have not been challenged on appeal. I cannot sit on appeal of their determinations.

28. By the time the deceased had died these issues had already been litigated between the deceased and the applicants. By the time the grant was made in 2010, judgment in HCCC 935 of 2001 was still intact and until it is set aside by a superior court, this court cannot be heard to say anything about it.

29. That is why all the allegations of non-disclosure, fraud, *et cetera* are wrongfully before this court. The applicants ought to have filed their appeal in HCCC 935 of 2001 or ELC 43 of 2013 if they wanted a stay against Justice Mulwa’s judgment, that was the place to go, not here.

30. The applicants must stop this circus and sit down and consider properly their mode of approaching the court. The applicants had also filed a Notice of Preliminary Objection in their application, on the ground that all the judges who preceded me in this matter, in various suits that they have lost, had no jurisdiction to deal with the matter. Again, wrong court, they must move to the next court.

31. The issue herein is related to land, a lot of land, 540 acres, I heard. The applicants are pursuing their case in circles forgetting that the courts will always know when a litigant has already been before us and we have made orders.

32. The hierarchy of court exists for a reason. Applicants must stop this splitting of hairs and pursue their matter in the appropriate court.

33. The issues raised by the applicants to support the Notice of Motion are issues that are already settled by other courts of concurrent jurisdiction against the applicants and in favour of the respondents. Those judgments are in force and have not been overturned. Those issues cannot be re litigated in the guise of this application. The application is not merited. The same is dismissed with costs.

Dated at Nakuru this 21st day of May 2020.

Mumbua T Matheka

Judge

Dated, delivered and signed this 29th day of May, 2020.

In the presence of: VIA ZOOM

Edna Court Assistant

Onyango, Opiyo & Co. Advocates: Ms Opiyo

Waiganjo & Co. Advocates: Ms Wangari holding brief